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No. 06-749

In the Supreme Court of the United States

JOSEPH MORRISON AND ALICE MORRISON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the wetlands at issue in this case, which are adjacent to navigable-in-fact waters, are "waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 11
Grutter v. *Bollinger*, 539 U.S. 306 (2003) 10
International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) 4
League of United Latin Am. Citizens v. *Perry*, 126 S. Ct. 2594 (2006) 11
Marks v. *United States*, 430 U.S. 188 (1977) 10
Morrison v. *United States*:
540 U.S. 877 (2003) 7
540 U.S. 1070 (2003) 7
Nichols v. *United States*, 511 U.S. 738 (1994) 10
Rapanos v. *United States*, 126 S. Ct. 2208 (2006) .. *passim*
Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) .. 4, 8
United States v. *Johnson*, 467 F.3d 56 (1st Cir. 2006) ... 11
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 4
Waters v. *Churchill*, 511 U.S. 661 (1994) 11
Wilton v. *Seven Falls Co.*, 515 U.S. 277 (1995) 11

Constitution, statutes, regulations and rules: Page

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 4
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) 2
33 U.S.C. 1251(a) 2
33 U.S.C. 1311(a) (§ 301(a)) 2, 3
33 U.S.C. 1344 (§ 404) 2, 3
33 U.S.C. 1344(a)-(c) 3
33 U.S.C. 1362(7) 3
33 U.S.C. 1362(12)(A) 3
33 C.F.R.:
Section 328.3 3
Section 328.3(a) 3
Section 328.3(a)(1) 3
Section 328.3(a)(7) 3, 9
Section 328.3(c) 3, 9
40 C.F.R.:
Section 230.3(s) 3
Section 230.3(s)(1) 3
Section 230.3(s)(7) 3
Fed. R. App. P. 28(j) 8, 15
Fed. R. Civ. P.:
Rule 12(b)(6) 2, 7
Rule 60(b) 8, 15
Rule 60(b)(6) 2, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the *Federal Reporter* but is reprinted in 178 Fed. Appx. 481. A prior opinion of the court of appeals (Pet. App. E1-E9) is reported at 321 F.3d 578. The order of the district court (Pet. App. B1-B2) and the report and recommendation of the magistrate judge (Pet. App. B3-B7) are unreported. Prior orders of the district court (Pet. App. C1-C2, F1-F7) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2006. A petition for rehearing was denied on August 25, 2006 (Pet. App. G1). The petition for a writ

of certiorari was filed on November 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action brought by the United States under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.)* (Clean Water Act or CWA). The government alleged that petitioners had discharged fill material into "the waters of the United States" without a permit, in violation of 33 U.S.C. 1311(a) and 1344. In October 2000, the district court granted the government's motion for summary judgment, holding that petitioners' unpermitted discharges into wetlands adjacent to the St. Clair River were in violation of the CWA. Pet. App. F1-F7. Petitioners were ordered, inter alia, to pay a civil penalty of $25,000. *Id.* at E3-E4.

Nearly four years after entry of judgment for the United States, petitioners filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), claiming that the facts did not establish a violation of the CWA and that the federal courts lacked jurisdiction over the relevant site. Pet. App. B6. In March 2005, the district court denied petitioners' motion, which the court reviewed under the standard set forth in Federal Rule of Civil Procedure 60(b)(6) for relief from a judgment. Pet. App. B1-B2. The court of appeals affirmed. *Id.* at A1-A5.

1. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act.

33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). That definition encompasses, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1), as well as wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The Corps' regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its pow-

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

ers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water,"

126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, *id.* at 2227.[2] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring in the judgment); see *id.* at 2248. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting).

3. Petitioners own property on Harsens Island, Michigan, adjacent to the St. Clair River, which is a navigable-in-fact waterway. See Pet. App. A5, F2, F6; Pet. 5, 8. In March 1999, the United States filed a complaint against petitioners (and others) alleging that they had violated the CWA by filling wetlands on petitioners' property without a permit. Pet. App. E2; see *id.* at F2.[3]

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

[3] At the time of the filing of the complaint, petitioner Alice Morrison was known as Alice Pauley. Pet. App. F2. She subsequently married

On October 31, 2000, the district court (per Cleland, J.) granted the United States' motion for summary judgment with respect to liability. *Id.* at F1-F7. The court found that petitioners' discharges were into "navigable waters" covered by the CWA because the wetlands at issue are adjacent to the St. Clair River. *Id.* at F6.

At a penalty hearing held on February 8, 2001, the United States proffered the district court a consent decree. Under the consent decree, defendant Samuel Pauley agreed to hire a contractor to remove all fill material from the wetlands by May 15, 2001. Pet. App. E3.[4] The consent decree was contingent on either Samuel Pauley's receiving permission from petitioners to enter the property or the issuance of a court order requiring petitioners to permit him access. *Ibid.* The district court ordered petitioner Alice Morrison to "allow access to the property by the [c]ontractor and Corps of Engineers to complete the restoration as set forth in the consent decree." *Ibid.* The court also ordered petitioners to pay a $25,000 civil penalty, noting petitioners' history of refusing to comply with the law and their failure to keep their earlier promises to remedy the violation. *Id.* at E3-E4. No appeal was taken from the district court's judgment.

Notwithstanding the district court's order, petitioner Alice Morrison refused to grant Samuel Pauley's contractor and the Corps access to the property. Pet. App. E4. On May 9, 2001, the United States filed an emergency motion to enforce the consent decree. *Ibid.* Judge Cleland disqualified himself, and the matter was

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petitioner Joseph Morrison. *Id.* at B3.

[4] Samuel Pauley is Alice Morrison's father. Pet. App. E2; see note 3, *supra*. He is not a petitioner in this Court.

reassigned to Judge Woods. *Ibid.* At a hearing on the government's emergency motion, the district court *sua sponte* vacated the $25,000 civil penalty. *Id.* at E4-E5. The United States appealed. The court of appeals reversed and remanded the case for reimposition of the $25,000 civil penalty. *Id.* at D1, E1-E9; see *id.* at C1-C2 (reinstating civil penalty on remand). This Court denied petitioners' petition for a writ of certiorari, *Morrison* v. *United States*, 540 U.S. 877 (2003), and their subsequent petition for rehearing, *Morrison* v. *United States*, 540 U.S. 1070 (2003).

4. When petitioners refused to pay the $25,000 civil penalty, the United States initiated garnishment proceedings. On April 22, 2004, a magistrate judge denied petitioners' motion to stay execution of garnishment. Pet. App. B4. On September 16, 2004, petitioners filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Pet. App. B4. The magistrate judge recommended that petitioners' motion be denied. *Id.* at B3-B7. The magistrate judge explained that "[f]inal judgment was entered almost four years ago and it was found then * * * that there were sufficient facts to establish a violation of the Clean Water Act." *Id.* at B6. The magistrate judge found no basis for granting petitioners relief from judgment under Federal Rule of Civil Procedure 60(b)(6). Pet. App. B6. The district court adopted the magistrate judge's report and recommendation and denied petitioners' motion to dismiss. *Id.* at B1-B2.

5. The court of appeals affirmed. Pet. App. A1-A5. The court noted that petitioners did not dispute that "[t]he wetlands in question are adjacent to the St. Clair River." *Id.* at A2. The court of appeals observed that, under this Court's decision in *SWANCC*, "there must be

a 'significant nexus' between the wetlands and navigable waters in order for the United States to have jurisdiction over the wetlands in question." *Id.* at A4 (quoting *SWANCC*, 531 U.S. at 167). A "significant nexus" exists, the court explained, when the wetland is "adjacent to a navigable body of water." *Ibid.* The court concluded that the wetlands at issue here are covered by the CWA because those "wetlands are adjacent to the St. Clair River" and "the St. Clair River is a navigable body of water." *Id.* at A5.

The court of appeals issued its decision on April 26, 2006. Pet. App. A1. On June 6, 2006, petitioners filed a petition for rehearing and rehearing en banc. While that petition was pending, this Court issued its decision in *Rapanos*. Petitioners then brought *Rapanos* to the court of appeals' attention pursuant to Federal Rule of Appellate Procedure 28(j). Pet. App. H1. The court of appeals subsequently denied the petition for rehearing and rehearing en banc without comment. *Id.* at G1.

ARGUMENT

Petitioners contend (Pet. 5, 8-14) that the judgment of the court of appeals should be vacated and the case should be remanded for reconsideration in light of *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). That disposition is unwarranted. The Sixth Circuit's opinion makes clear that application of the standards endorsed by a majority of this Court in *Rapanos* would not alter the outcome here. Indeed, the court of appeals had *Rapanos* before it when the court denied petitioners' request for rehearing. And because petitioners seek in this proceeding to reopen a final judgment, they are entitled to prevail only if they can establish one of the bases for relief set forth in Federal Rule of Civil Proce-

dure 60(b)—a burden they make no attempt to satisfy. The petition for a writ of certiorari therefore should be denied.

1. Under the Corps' regulations implementing the CWA, the term "waters of the United States" is defined to include all wetlands "adjacent to" other covered waters. 33 C.F.R. 328.3(a)(7). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c). A finding of adjacency under the regulations does not depend on a showing of a hydrological connection between a wetland and another covered water.

In a ruling issued before this Court's decision in *Rapanos*, the court of appeals in this case sustained the categorical approach to adjacent wetlands reflected in the Corps' regulations. See Pet. App. A4-A5 (finding CWA jurisdiction based on the wetlands' adjacency to a navigable body of water). In *Rapanos*, however, five Members of this Court concluded that the pertinent regulatory provisions are overbroad insofar as they define the term "waters of the United States" to encompass *all* wetlands adjacent to other covered waters. See 126 S. Ct. at 2227 (plurality opinion) (concluding that a wetland is covered by the CWA only if it has a "continuous surface connection with" another covered water); *id.* at 2248-2249 (Kennedy, J., concurring in the judgment) (concluding that a wetland adjacent to a non-navigable tributary is covered only if it has a "significant nexus" to navigable-in-fact waters). When a particular wetland satisfies neither the plurality's standard nor that of Justice Kennedy, it falls outside the CWA's coverage under the approaches taken by a majority of this Court, even if it is encompassed by the regulatory definition of "waters of the United States."

2. Under a proper understanding of *Rapanos*, the Corps may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265-2266 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the Corps' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members.

In *Marks* v. *United States*, 430 U.S. 188 (1977), this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation and internal quotation marks omitted). Taken in isolation, the *Marks* Court's reference to "those Members who concurred in the judgments" might suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in *Marks* provides a sensible approach to determining the controlling legal principles of the case. But in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.

In these circumstances, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view of the law that a majority of this Court has unambiguously embraced. See *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same); *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (concluding that the federal government can establish juris-

diction over waters that "meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*").

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). And the application of that approach here clearly supports finding the existence of federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See *id.* at 2265 (Stevens, J., dissenting).

3. Petitioners contend (Pet. 8-12) that the lower courts must apply solely the standard set forth by the *Rapanos* plurality, not that of Justice Kennedy, in determining whether particular wetlands fall within the CWA's coverage. In petitioners' view (Pet. 10), *Marks* requires that the *Rapanos* plurality opinion be treated as the holding of the Court because the plurality's "rationale is a logical subset of Justice Kennedy's concurrence." That argument lacks merit.

In *Rapanos*, five Justices agreed that the judgments of the Sixth Circuit in the consolidated cases under review should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); *id.* at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a

relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuous surface connection" to those tributaries. *Id.* at 2235. Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant nexus with [traditional] navigable waters." *Id.* at 2252; see *id.* at 2250-2252.

Because neither of those grounds for decision is inherently narrower than the other, it is logically impossible to identify a consensus narrowest position among the views of the Justices who concurred in the judgment. Petitioner is wrong in contending (Pet. 11) that "Justice Kennedy's test would find jurisdiction in all cases where the plurality opinion would." Justice Kennedy observed that the plurality's test "covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)," 126 S. Ct. at 2246, and he indicated that at least some such wetlands would not fall within the CWA's coverage as he construed the statute, see *id.* at 2246, 2249.[5]

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[5] Even assuming arguendo that the plurality's approach would always be more restrictive of CWA jurisdiction than would Justice Kennedy's approach (which, as explained in text, it is not), petitioners would still be wrong in contending that the plurality's approach stated the "narrowest ground" within the meaning of the *Marks* rule. To the contrary, Justice Kennedy's concurrence would then state the "narrowest ground" in that it would reflect the narrowest disagreement with the judgment below and with the approach advocated by the four dissenters. Petitioners' contrary suggestion—that the plurality opinion must be deemed the narrowest ground for the *judgment* on the theory that it adopted the narrowest view of CWA *jurisdiction*—mixes apples and oranges and would lead to the bizarre conclusion that a rule of law expressly rejected by five Justices nonetheless was binding on the lower courts.

4. In the instant case, the court of appeals found that the wetlands at issue are adjacent to the St. Clair River. See Pet. App. A5. Petitioners do not dispute that the St. Clair River is a traditional navigable water. See Pet. 5, 8. The adjacent wetlands at issue in this case are therefore subject to federal regulatory jurisdiction under the analysis set forth in Justice Kennedy's *Rapanos* concurrence.

In his concurring opinion in *Rapanos*, Justice Kennedy stated that, "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." 126 S. Ct. at 2248; see *id.* at 2249 ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."). Justice Kennedy would have required the Corps to "establish a significant nexus on a case-by-case basis" only when the agency "seeks to regulate wetlands based on adjacency to *nonnavigable* tributaries." *Ibid.* (emphasis added).[6] Because the water body to which petitioners' wetlands are adjacent is a traditional navigable water, the Corps could properly assert regulatory jurisdiction over those wetlands based on "adjacency alone." *Id.* at 2248. Further review of this case under the *Rapanos* standard is

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[6] Justice Kennedy would permit the Corps, through regulation or adjudication, to "identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." 126 S. Ct. at 2248.

therefore unnecessary because *Rapanos* would compel the same result reached by the court below.

5. Vacatur of the court of appeals' judgment is particularly unwarranted for two additional reasons. First, the Sixth Circuit has already had the opportunity to consider the question whether the relevant wetlands are subject to federal regulatory authority under the standards set forth in the various opinions in *Rapanos*. While petitioners' petition for rehearing was pending before the court of appeals, this Court decided *Rapanos*, and petitioners then brought *Rapanos* to the court of appeals' attention pursuant to Federal Rule of Appellate Procedure 28(j). Pet. App. H1. *Rapanos* was decided on June 19, 2006, see 126 S. Ct. at 2208, and the court of appeals denied rehearing and rehearing en banc in this case on August 25, 2006, see Pet. App. G1. A remand for reconsideration is therefore unnecessary to ensure that the court of appeals is given the opportunity to assess the impact of *Rapanos* on its resolution of this case.

Second, because petitioners seek in this case to reopen a final judgment, they can prevail only by establishing one of the bases for relief set forth in Federal Rule of Civil Procedure 60(b). See Pet. App. B2, B5-B6. Petitioners make no effort to show that they can demonstrate an entitlement to relief under Rule 60(b). Although the court of appeals did not base its decision on that ground, petitioners' inability to establish the prerequisites for relief from a final judgment provides a further reason for denying review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2007